SUPREME COURT, U. S.

DEC 30 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 887

3259 M STREET, INC., *Petitioner*

v.

THE CITIZENS ASSOCIATION OF GEORGETOWN, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRANK H. STRICKLER
815 - 15th Street, N.W.
Washington, D. C. 20005
Attorney for Petitioner,
3259 M Street, Inc.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1968

No. 22,074

THE CITIZENS ASSOCIATION OF GEORGETOWN, *Appellant,*

v.

JOY R. SIMONSON, ET AL., *Appellees*

Before: BAZELON, Chief Judge; DANAHER and TAMM, Circuit Judges in Chambers.

Order

This cause came on for hearing on Appellant's motion for summary reversal and on Joy R. Simonson and other Appellees' motion for summary affirmance and the Court heard argument of counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order of the District Court appealed from herein is reversed and this case is remanded to the District Court for further proceedings consistent with the opinion filed this date.

Per Curiam.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

3259 M STREET, INC., *Petitioner*

v.

THE CITIZENS ASSOCIATION OF GEORGETOWN,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, 3259 M Street, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on September 30, 1968.

DECISION BELOW

The judgment was rendered in the form of an opinion and order which granted the motion of The Citizens Association of Georgetown for summary reversal of an order dismissing the action entered by the United States District Court for the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at —— U.S. App. D.C. ——, —— F.2d —— and appears in Appendix A to this petition. The order, which will not be published, appears in Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals, which reversed the final order of the United States District Court for the District of Columbia, was entered on September 30, 1968 (R. 5).

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether a non-taxpaying citizens' association, which can show no injury to itself and which does not have the substantive right sought to be enforced, is the real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure?

(2) Whether a non-taxpaying citizens' association, which can show no injury to itself and which does not have the substantive right sought to be enforced, has standing—in a representative capacity—to institute suit to protect alleged rights of certain members of the association, none of whom joined in the litigation as parties or otherwise indicated that the association was representing their alleged interests?

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

United States Constitution, Article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

District of Columbia Code (1967 ed.), Title 25, Section 115(a)(5):

> "Any individual, partnership, or corporation desiring a license under this chapter shall file with the Board an application in such form as the Commissioners may prescribe, and such application shall contain such additional information as the Board may require, and (except in the case of an application for a manufacturer's license, retailer's license, class E, or solicitor's license) shall contain a statement setting forth the name and address of the true and actual owner of the premises upon which the business to be licensed is to be conducted. Before a license is issued the Board shall satisfy itself:
>
> * * *
>
> 5. That the place for which the license is to be issued is an appropriate one considering the character of the premises, its surroundings, and the

wishes of the persons residing or owning property in the neighborhood of the premises for which the license is desired."

Federal Rules of Civil Procedure, Rule 17(a):

> "Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. * * *"

STATEMENT OF THE CASE

Petitioner operates a restaurant at 3259 M Street, N.W., Washington, D. C., in an area which is zoned commercial (Complaint, pp. 2-3, Exhibit A). It caters to college students and other young persons, and is known as the "Crazy Horse". Its policies have been such that the "hippies" and "hippie types" have been *excluded* from the restaurant and, at each of several license reissuance hearings, the management has been highly praised for the orderly manner in which the restaurant is operated (Complaint, Exhibit A, pp. 1-2).

The Citizens Association of Georgetown (hereinafter the "Association") is a tax exempt, non-profit corporation which draws its membership from persons residing in or owning property in the densely populated one mile square area of the District of Columbia known as Georgetown. While the Association claims to have about seventeen hundred members, the record does not disclose the number of Association members

who reside or own property in the immediate neighborhood of 3259 M Street (Complaint, pp. 2-3). Since the neighborhood is for the most part zoned commercial, petitioner believes that only a small fraction of the 1700 members reside or own property in the said neighborhood. The Association instituted the action below against petitioner and the individual members of the District of Columbia Alcoholic Beverage Control Board. The suit alleged that a Retailer's Class "C" license was invalidly issued to petitioner (Complaint, p. 6).

The District of Columbia Alcoholic Beverages Control Act (25 D.C. Code § 101, *et seq.*), inter alia, provides for the licensing of retailers of alcoholic beverages and a Retailer's Class "C" license for premises 3259 M Street was issued in 1964 and has been reissued annually ever since. In 1967 and 1968, petitioner's applications for reissuance of its licenses were protested and public hearings were held pursuant to Section 25-115(a)(5) which provides that the Board, prior to granting a license, must consider:

> ". . . the wishes of the persons residing or owning property in the neighborhood of the premises for which the license is desired."

The hearing record, including petitions presented by those favoring and those opposing reissuance of the license, shows that a substantial majority, including property owners in the immediate neighborhood, favored reissuance of petitioner's license. The Alcoholic Beverage Control Board (hereinafter the "Board"), in a well reasoned decision which discussed the wishes of persons residing in the neighborhood, directed reissuance of petitioner's license for the 1968 license year (Complaint, Exhibit A). Thereafter, the Asso-

ciation brought suit seeking a declaration that petitioner's 1968 license was invalid because:

(1) The Board made no finding of fact or conclusion of law as to whether 3259 M Street, Inc. was a bona fide restaurant as defined in the Act, and

(2) The Board erroneously and contrary to the weight of the evidence issued the license over the objections of persons residing in or owning property in the neighborhood.

The record shows that none of the persons residing in or owning property in the neighborhood of 3259 M Street joined in the action and neither the complaint nor any subsequent pleading shows that such individuals have ratified the Association's action. In short, the Association, standing alone, was the only plaintiff.

Petitioner and the Board member defendants moved to dismiss the complaint on the ground that the Association was not the real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure and that it lacked standing to maintain the action. After full briefing and argument, the action was dismissed by order of the District Court which found the Association lacked standing to sue. The District Court allowed the Association time to add individual parties.

Instead of doing so, the Association appealed to the United States Court of Appeals for the District of Columbia and subsequently moved for summary reversal. During argument on that motion, counsel for the Association advised the court below that the Association did not want any of the individuals it was representing to be parties plaintiff because the Association wanted to control the litigation. Counsel asserted

that such control might be lost if individual residents or property owners were parties.[1]

The Court of Appeals did not discuss the question whether the Association was the real party in interest as required by Rule 17(a) of the Federal Rules of Civil Procedure. It reversed on the ground that the Association, acting on its own initiative, had standing to sue on behalf of individual members who resided in the immediate neighborhood. In so ruling, the court below established a principle of *vicarious standing to sue* which is wholly at odds with both the standing and real party concepts. Thus, the Court stated:

> "Since the association is an authorized spokesman organized to promote these interests for its individual members, it too has standing to sue in order to protect their interests."

REASONS FOR GRANTING THE WRIT

A. Introductory

The decision of the Court of Appeals is of vital significance in the administration of justice for it grants associations and like groups (which must number in the tens of thousands) the right to seek judicial relief if the association, upon the vote of a majority of its members, believes that a few or even many of its members have interests which it ought to protect. The principle enunciated is at odds with the Constitution of the United States, decisions of this Court, decisions in other state and federal courts, and the Federal Rules of Civil Procedure.

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[1] Petitioner was denied a transcript of counsel's argument for use in this Court (R. 11).

The decision of the Court of Appeals is impractical and illogical in that it permits the wishes of a majority of the members of an association to determine whether the association should litigate to protect alleged interests of individual members of the association. Thus, it is possible that the majority could institute judicial proceedings contrary to the wishes of the individuals directly concerned.

B. The Constitution, Article III, Section 2

The pronouncements of this Court establish that the judicial power conferred by Article III extends only to genuine cases and controversies between adverse litigants. *Massachusetts* v. *Melloy,* 262 U.S. 447, 67 L. Ed. 1078 (1923); *Aetna Life Insurance Company* v. *Haworth,* 300 U.S. 227, 81 L. Ed. 617 (1937); and *Alabama* v. *Ickes,* 302 U.S. 464, 82 L. Ed. 374 (1938). Thus, as was said in *Associated Industries* v. *Ickes,* 134 F. 2d 694, 700 (2nd Cir. 1943), vacated as moot, 320 U.S. 707, 88 L. Ed. 414 (1943):

> ". . . In a suit in a federal court by a citizen against a government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no justiciable 'controversy', without which, under Article III, § 2 of the Constitution, the court has no jurisdiction, unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen . . . ."

Stated another way, a party seeking equitable relief must allege in his complaint "an injury or threat to a particular right of * * * his [or its] own"; that is, the right must be one which is his to assert, as distinguished from that of the general public. *Perkins* v.

Lukens Steel Co., 310 U.S. 113, 125, 84 L. Ed. 1108 (1940).

These principles will be violated if citizens associations (and similar groups) which do not allege any invasion of rights, which do not allege any injury whatsoever and which do not allege that the persons they are seeking to represent ratified the suit, are permitted to sue whenever a majority so desires. Such a corporate approach has never heretofore been held to be a sufficient basis to support the initiation of litigation. It is a simple fact that the Association has not and cannot suffer any injury by virtue of the reissuance of petitioner's license and, therefore, there is no genuine case or controversy.

C. The Association Is Not the Real Party in Interest

Rule 17(a) requires that actions may be brought only by the "real party in interest". It is well settled that the "real party in interest" is the party who, by the substantive law, possesses the right sought to be enforced. *Rock Drilling, Blasting, etc.* v. *Mason and Hanger Company*, 217 F. 2d 687 (2nd Cir. 1954), *cert. denied* 349 U.S. 915. 99 L. Ed. 1249 and *Gagliano* v. *Bernsen*, 243 F. 2d 883 (5th Cir. 1957). In the *Gagliano* case, the court succinctly stated the rule as follows:

> "An action must be brought in the name of the real party in interest. Fed. Rules Civ. Proc. Rule 17(a), 28 U.S.C.A. The real party in interest is the person who possesses the right sought to be enforced. 2 Barron & Holtzoff § 482. Frank Gagliano does not meet this test."

In *Mullaney* v. *Anderson*, 342 U.S. 415, 96 L. Ed. 458 (1952), the Alaska Fishermen's Union and its

Secretary-Treasurer brought suit on behalf of the some 3,200 non-resident members to enjoin the Tax Commissioner of the Territory of Alaska from collecting a non-resident license fee. In the Supreme Court, for the first time, the Tax Commissioner questioned the standing of respondent union and its Secretary-Treasurer to maintain the suit. To avoid the controversy, the union and its Secretary-Treasurer moved for leave to add two individual members as parties plaintiff. The Court granted the motion and in so doing it recognized that the individual members—not the union—were the real parties in interest. The Court stated:

> "To grant the motion merely puts the principal [the individual], the real party in interest, in the position of his avowed agent."

The decision of the Court of Appeals is in conflict with each of the foregoing authorities.

D. The Court of Appeals Ignored Uniform Law in Holding That the Association Had Standing To Sue

In its motion for summary reversal (R. 2, p. 9), as well as in oral argument, counsel for the Association contended it wanted to be the sole party because it did not want to lose control of the suit to individual parties. This is not a case where it would be difficult for those persons residing in the neighborhood to bring a suit challenging the reissuance of petitioner's license. It is a case where no right of the Association has been violated, where there are no major constitutional issues and where there are no policy considerations which would compel the result reached by the Court of Appeals.

The subject of standing to sue was thoroughly discussed in *Flast* v. *Cohen,* 392 U.S. 83, 20 L. Ed. 2d 947 (1968). In that case several individual taxpayers brought suit alleging that the First Amendment to the Constitution was being violated by the expenditure of funds to finance instruction in religious schools. The Court repeated the basic principles urged herein and said:

> "It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy', Baker v. Carr, supra, at 204, 7 L.Ed. 2d at 678, and whether the dispute touches upon 'the legal relations of parties having adverse legal interests.' Aetna Life Insurance Co. v. Haworth, supra, at 241, 81 L. Ed. at 621, 108 ALR 100."

Petitioner respectfully submits that the Association does not have "a personal stake" in the controversy alleged in the complaint. The *Flast* case held that standing to sue questions are to be resolved after examination of all factors to determine whether or not there is a nexus between the cause of action stated and the party bringing suit. The Court of Appeals could not find that such a nexus existed between the Association and the cause of action alleged. Instead, it enunciated a unique—and erroneous—principle of federal law which conflicts with each of the decisions of this Court hereinabove cited. In short, the Court of Appeals created a principle of vicarious standing and ruled that an association has standing if it acts as a spokesman for certain individuals who can meet the nexus requirement.

The decision of the Court of Appeals also conflicts with state court decisions and departs from the course of usual and accepted judicial practices.

In *Glen Burnie Improvement Association, Inc.* v. *State Appeal Board,* 213 Md. 407, 132 A.2d 451 (1957), the association, alleging specific violations of the liquor licensing law, challenged the issuance of a license. The Court of Appeals of Maryland affirmed the dismissal of the complaint by the lower court. In so doing, the Court carefully pointed out that the association was not injured even though its members might have an interest. In short, the Court held that the arguments available to the individuals were not available to the corporate association which, therefore, lacked standing to sue. Similar rulings were made in the following cases: *Bar Association of Montgomery County* v. *District Title Insurance Co.,* 224 Md. 474, 168 A.2d 395 (1961); *Southland Hills Improvement Association, etc.* v. *Raine,* 220 Md. 313, 151 A.2d 734 (1959); *In re Seitz,* 157 Pa. Super. 553, 43 A.2d 547 (1945); *Windsor Hills Improvement Ass'n.* v. *Mayor & City Council,* 195 Md. 383, 73 A.2d 531, 535 (1950); *Lido Beach Civic Association, Inc.* v. *Board of Zoning Appeals of the Town of Hempstead,* 13 A. D. 2d 1031, 317 N.Y.S. 2d 364, 365 (1961); *Lindenwood Improvement Association* v. *Lawrence,* 273 S. W. 2d 30 (Mo. 1955); and *Miller* v. *Incorporated Village of East Hills,* 41 Misc. 2d 525, 245 N.Y.S. 2d 718 (1963).

E. The Decisions Relied on by the Court of Appeals Are Inapposite

The Court of Appeals relied on a series of six cases to support its conclusion that the Association had standing to sue. The decision in each case was based on this Court's decision in *National Association for Advancement of Colored People* v. *State of Alabama,* 357 U.S. 449, 2 L. Ed. 2d 1488 (1958). Petitioner sub-

mits that the Court of Appeals erroneously applied the *NAACP* decision.

In *NAACP*, the association was the party defendant in a civil contempt proceeding and there was no issue as to the right of NAACP to institute suit. In this frame of reference, the Court held that the basic constitutional right of freedom of association could be asserted by the association since: (1) the association and its members were in every practical sense identical; (2) the right would be nullified if the association could not assert it; and (3) there was a reasonable likelihood that the association itself would be adversely affected if it complied with the disclosure order. None of these factors are present in the instant case and the Court of Appeals' interpretation and application of *NAACP* was clearly erroneous.

CONCLUSION

Assuming *arguendo* that a valid cause of action exists, it is respectfully submitted that the only proper parties are the individuals who own property or reside in the petitioner's neighborhood. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK H. STRICKLER
815 - 15th Street, N.W.
Washington, D. C. 20005
Attorney for Petitioner,
3259 M Street, Inc.

December 30, 1968